DEPARTMENT OF THE ARMY
U.S. ARMY ENGINEER DIVISION, GREAT LAKES AND OHIO RIVER
CORPS OF ENGINEERS
550 MAIN STREET, ROOM 10-032
CINCINNATI, OHIO 45202-3222

REPLY TO
ATTENTION OF

Programs Directorate

NOV 13 2007

Mr. Dennis Cerny
P.O. Box 41
9689 Freeway Drive
Macedonia, Ohio 44056

Dear Mr. Cerny:

I received your March 7, 2007 Request for Appeal (RFA) of an approved jurisdictional determination (JD) issued by the Buffalo District on January 10, 2007 (file number 1997-5120016(8)) for lands located to the south of 6359 Chittenden Road, Boston Heights, Summit County, Ohio. You disagree with the District's determination that waters of the United States, subject to federal jurisdiction and regulation under the Clean Water Act, 33 U.S.C. 1344, are present on the subject property. Your RFA was determined to meet the criteria for appeal, was accepted, and I have now completed my review of your RFA.

On June 19, 2006, the U.S. Supreme Court issued its decision in *Rapanos v. United States*, ___ U.S. ___, 126 S.Ct. 2208, (2006)("Rapanos"). The *Rapanos* decision addresses the scope of the Corps' regulatory jurisdiction under Section 404 of the Clean Water Act (CWA). Given questions related to CWA jurisdiction raised by this decision, action on the merits of your RFA was postponed until the U.S. Environmental Protection Agency (USEPA) and the Army issued joint national guidance interpreting the *Rapanos* decision to their respective agencies.

On June 5, 2007, the Corps and USEPA released joint guidance interpreting *Rapanos* ("*Rapanos* Guidance"). The *Rapanos* Guidance directs the Districts to continue to assert jurisdiction over traditional navigable waters (TNWs) and all wetlands adjacent to TNWs. The Rapanos Guidance also explains that jurisdiction can be established over waters, including wetlands that are not TNWs, by meeting one of two standards articulated by the U.S. Supreme Court decision. These standards recognize regulatory jurisdiction over:

1) a water body that is not a TNW if that water body is "relatively permanent" and over wetlands adjacent to such water bodies if the wetlands "directly abut" the water body;

and

2) tributaries that are not relatively permanent and their adjacent wetlands where the existence of a significant nexus has been determined. Generally, a significant nexus may be found where waters, including their adjacent wetlands, affect the chemical, physical or biological integrity of TNWs.

In light of the *Rapanos* decision and subsequent guidance, the JD referenced above is remanded to the District to undertake any necessary data collection and analysis and to re-evaluate and document its determination consistent with the *Rapanos* Guidance. Given that the JD that is the subject of your appeal was prepared without consideration of the *Rapanos* decision, the original JD that is the subject of the RFA is moot and the merits of each of the reasons for appeal articulated in your RFA were not subjected to a detail review by this office. If you continue to have any concerns with the District's review of jurisdiction on your property, you should raise those concerns with the District in the course of the preparation of the revised JD. In addition, you may raise objections to jurisdiction in any future appeal of a permit decision by the District.

Accordingly, this letter serves as the decision document for your RFA and this concludes the Corps' administrative appeal process. I have directed the District to move forward on its reconsideration expeditiously; therefore, you should expect to be contacted by the District in the near future. Please contact me regarding any questions you may have about the review and evaluation of your RFA. I can be contacted via telephone at (513) 684-6212, in writing at the above address or e-mail at michael.g.montone@lrdor.usace.army.mil .

Sincerely,

Michael G. Montone
Administrative Appeal Review Officer

Copy furnished:
Commander, Buffalo District
Headquarters, USACE